

# SPVs in structured finance transactions: Jersey (Channel Islands)

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An article on the establishment of structured finance SPVs in Jersey, Channel Islands.

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### Scope of this article

This article addresses the establishment of structured finance *SPVs* in Jersey (Channel Islands), including a discussion on the reasons for choosing Jersey, the types of corporate structures typically used and applicable international standards and local regulations.

### Rationale for choosing Jersey

Jersey entities are used for a broad range of structured finance transactions. Investors worldwide are familiar with purchasing instruments issued by Jersey entities. The types of structured finance transactions undertaken in Jersey include:

- Structured note issuance, *Securitisations*.
- *CLOs* and other asset-backed issuance such as *CMBS* and *RMBS*.
- *Note repackagings*.
- Credit linked transactions such as *credit derivatives* and *credit linked notes*.
- Risk transfer products.
- Islamic finance structures.
- Regulatory capital optimisation.

Often, the challenge for multinational companies, investment banks and fund managers is how to create a business or investment fund structure which is able to accommodate international investors within existing tax and securities laws that apply to the investors, the management team and the business or investment activities, each of which could be based in multiple jurisdictions.

Jersey entities provide a neutral base in which to combine investors from a number of jurisdictions investing in assets located in the same or other jurisdictions. This means that investors are not subject to double taxation by virtue of the SPV adding extra layers of taxation at different levels of the structure in addition to the investors' home country tax. This neutrality is important because it provides a level playing field for all investors. It avoids creating a vehicle in a jurisdiction that may provide more benefits to some investors over others.

Jersey offers the opportunity to do this without foreign exchange controls and without significant restrictions on the payment of interest or dividends, the repayment of capital or the ability to repurchase shares or redeem or repurchase debt.

Specific practical reasons for the extensive use of Jersey companies by institutions, governments and major corporations include:

- Speed and ease of establishment.
- Relatively low cost, particularly in the context of typical transaction sizes.
- Bankruptcy remoteness analysis on par with onshore analysis.

- Creditor/investor friendly security regime.
- Flexible and practical business statutes.
- Appropriate levels of compliance regulation.
- Ease of ownership transfer and tax status.
- Denomination of share capital in any currency and optionality regarding share capital maintenance and flexibility regarding share capital extraction.
- English-based legal system, established judiciary and absence of political or sovereign concerns. Company law in Jersey is based on English corporate law and principles. It contains the concepts of separate legal personality and limited liability and so will provide an environment and framework which is familiar to investors. This gives Jersey law and legal system a common origin with those of many of the jurisdictions of its users, including the United States.
- Jersey meets international standards on anti-money laundering and counter-terrorist financing, tax transparency, fair taxation, anti-BEPS measures, legal/economic substance (see *Economic substance*) and taxation information exchange. The European Union Code of Conduct Group on Business Taxation has confirmed Jersey as a cooperative tax jurisdiction, and it has been placed on the ECOFIN 'whitelist'. European and UK regulatory changes do not directly impact Jersey and despite these being evolving landscapes there are no proposed regulatory changes which we believe would significantly affect the use of a Jersey SPV.

## Corporate structures

Jersey SPVs are generally established as Jersey incorporated (limited liability) companies, but they can also be trusts, unit trusts, limited partnerships and (from 1 September 2022) limited liability companies (LLCs). This article therefore focuses on Jersey companies and references in this article to Jersey SPVs refer to Jersey registered limited companies.

## Memorandum and articles of association

For a private limited company, the memorandum and articles of association contain the constitution of the company and, amongst other things, set out the company's name, a statement as to its corporate capacity and details of the following (as applicable):

- Its authorised share capital (for a par value company).
- The number of shares of each class that the company is authorised to issue (for a no par value company).

## Incorporation time and fees

Incorporation applications may be signed by regulated corporate service providers in Jersey (CSPs), which can submit to the Jersey Companies Registry (Companies Registry) the completed memorandum and articles of association, certain other prescribed information and the appropriate fee. The Companies Registry can process an application for incorporation within a range of timeframes between two hours and five business days. The Companies Registry fee payable for such incorporation varies depending on processing times, but fees currently range from £165 (for a five business day service) to £670 (for a two hour service) per company.

On registration of the memorandum and articles of association of the company, the Companies Registry will issue a Certificate of Incorporation and, from the date of such certificate, the company exists as a legal entity. Jersey company law provides that the Certificate of Incorporation is conclusive evidence of the valid incorporation of the company. Upon incorporation, the memorandum and articles of association constitute a contract which binds the company and its shareholders.

## Shareholding

There is no minimum capitalisation requirement; a company's issued share capital can be entirely nominal. It is often the case that 250 ordinary shares with a par value of £1 or \$1.00 each are issued. All of the issued share capital can be held by one shareholder of record.

Shares may be par value or no par value (but a company cannot have both). The memorandum of association must simply state the maximum number of shares the company is authorised to issue or (for a no par value company only) that it may issue an unlimited number.

It is a usual rating agency requirement for a rated structured finance transaction that the Jersey company be bankruptcy remote hence the incorporation of the company as an 'orphan'. For this to be achieved, the shares of the company are held by a CSP share trustee under a declaration of trust for the benefit of a charitable institution or for charitable purposes. Generally, a small profit, in the form of a corporate benefit fee, needs to be generated at the Jersey SPV level to give effect to these arrangements.

## Beneficial ownership

The identities of the individual ultimate beneficial owners of holdings of more than 10% of the shares in a Jersey company need to be disclosed on a confidential basis to the Companies Registry on incorporation. The Companies Registry may also ask that information regarding ultimate beneficial owners with holdings of less than 10% be provided.

Where shares are to be held by a share trustee under a declaration of trust, the name of the trust and the names of the trustees must also be disclosed to the Companies Registry on a confidential basis.

The beneficial ownership register maintained by the Companies Registry is available to law enforcement agencies and tax authorities on request; however, it is currently not publicly available.

Any post incorporation changes to the beneficial ownership of the company generally need only be disclosed where the ultimate beneficial ownership increases or decreases above 25%. In certain circumstances, the threshold for such changes may be lower than 25%.

## Registered office

A company is required to have its registered office at an address in Jersey, which must be notified to the Companies Registry at the time of its incorporation. The registered office functions as an official address for a company where statutory communications can be sent, or documents served.

## Nominated Person

A company is required to appoint an individual or entity (Nominated Person), who is responsible for filing details of the company's beneficial owners and significant persons with the Companies Registry. It would be usual for the CSP to be appointed as the nominated person for the company and for the CSP in this capacity to file the relevant information with the Companies Registry as required.

## Directors

Jersey private companies must have at least one director. The board of directors may be comprised of such number of persons as may be desired, although it is usual for the board to consist of at least two persons. Corporate directors are permitted. The directors of a company are usually authorised to manage its business generally and to exercise the company's powers in accordance with the provisions of the memorandum and articles of association and applicable company law.

There is no Jersey legal requirement to appoint Jersey resident directors, however:

- For the purposes of the COBO Consent (see *Regulatory Consents*) the Jersey Financial Services Commission (JFSC) requires at least one Jersey resident director with appropriate experience and acceptable to the JFSC be appointed to the Jersey SPV board.
- As set out in *Regulatory Consents*, consideration may also need to be given as to how economic substance requirements will be met for Jersey tax resident issuers.

There is no Jersey legal requirement that any meetings of the board of directors be held in Jersey, however:

- It is often important that the meetings of the directors are held offshore from an onshore structuring perspective.
- As set out in *Regulatory Consents*, consideration may also need to be given as to how economic substance requirements will be met for Jersey tax resident issuers.

A register of directors must be maintained at the registered office which is open to inspection by the shareholders.

Details of the directors of a Jersey company are required to be disclosed to the Companies Registry as part of the incorporation process; where there are subsequent changes, these need to be notified to the Companies Registry by the Nominated Person within 21 days of such a change. The details of the directors are a matter of public record however, in certain circumstances, it is possible for a director to request their details not form part of the public record.

Under Jersey law, a director of a Jersey company is obliged to comply with a number of duties, breach of which may, in certain circumstances, result in personal liability on the part of the director. The duties include:

- Acting in good faith and with due care.
- Avoiding conflicts of interest.
- Exercising powers for a proper purpose.
- Not misusing company property.
- Exercising appropriate skill and care.

## Secretary

A secretary must be appointed by the board of directors. A sole director may not act as secretary and no company may have as secretary a body corporate whose sole director is sole director of the company. The secretary's duties are principally the keeping of minutes of directors' and shareholders' meetings, maintenance of the register of shareholders, recording transfers and the new

issues of shares, maintenance of the register of directors and ensuring the statutory requirements, such as filing of the annual confirmation statement (as set out in *Ongoing statutory requirements*), are fulfilled. Details as to the appointed secretary of the company are to be supplied to the Companies Registry, however this information will not be publicly available.

## Jersey tax

The zero-rated tax regime in Jersey operates by making all Jersey registered companies (and non-Jersey companies managed and controlled in Jersey) chargeable to Jersey income tax at the general corporate income tax rate of 0%.

Jersey companies may be exclusively tax resident in jurisdictions outside Jersey provided that:

- The company is centrally managed and controlled in another jurisdiction outside Jersey.
- The company is tax resident in that other jurisdiction.
- The highest rate of corporation tax in that other jurisdiction is 10% or more.

It is common for Jersey companies to be UK managed and controlled if they satisfy the above criteria.

No stamp duty is payable on the transfer of shares in a Jersey company and there is no corporation or capital gains tax in Jersey. There are also no annual taxes or charges by reference to a company's authorised or issued share capital. Although there is a 5% goods and services (consumption) tax (GST), companies beneficially owned outside of Jersey which do not supply goods or services in Jersey will generally qualify for 'international service entity' (ISE) status. ISE status effectively puts a Jersey company outside the scope of the GST regime, provided it pays an annual fee.

US or non-US holders (that is, any investors who are not tax resident in Jersey) of notes or other debt securities issued by a Jersey SPV will not be liable to any Jersey income, stamp duty, registration/transfer or other taxes by reason of their holding notes.

Economic substance requirements were introduced in January 2019 pursuant to the Taxation (Companies – Economic Substance) (Jersey) Law 2019 to give effect to certain commitments made by Jersey to the OECD. The economic substance rules in Jersey may be applicable to a Jersey private company participating in a structured finance transaction depending on the type of activities it carries out (see *Regulatory Consents*).

## Contractual requirements

In rated structured finance transactions, rating agencies generally require non-petition provisions to be included in any agreement between the orphan Jersey company and its creditors. Under these provisions the creditors agree not to petition for the insolvency of the company nor to join any proceedings. Further, the rating agencies require limited recourse language to be included which limits the recourse of creditors to the underlying assets supporting the transaction. In the event that such assets are insufficient to meet creditor's claims in full, the company has no further obligations to those creditors and the claims are extinguished. These concepts of contractual limited recourse, subordination, netting and non-petition are recognised and enforceable in accordance with their terms by the Jersey courts (contractual subordination, non-petition and netting are expressly catered for in statute).

## EU Market Abuse Regulation

The EU-wide market abuse regime (MAR) which was enhanced by publication of the MAR in 2014 (and effective July 2016) does not apply to unquoted Jersey SPVs as Jersey is not within the EU and therefore MAR does not have effect. Jersey SPVs

with securities listed on a securities exchange outside of the EU (such as The International Stock Exchange in the Channel Islands (TISE) or the Cayman Islands Stock Exchange (CSX)) also fall outside of the application of MAR.

The impact of this is that the disproportionately onerous aspects of MAR on issuers of medium-term debt held by professional investors will not apply to Jersey SPVs which do not have securities listed on EU exchanges.

## Ongoing statutory requirements

### Annual Confirmation Statement

Every Jersey company is required to file an Annual Confirmation Statement verifying that the beneficial owner information, significant person information and any other prescribed information provided to the Companies Registry in relation to the entity is accurate as at the date of the confirmation. Significant persons in respect of a company are the directors and the company secretary. The other prescribed information in respect of a company to be provided to the Companies Registry is:

- The names and addresses of the registered shareholders holding more than 1% of the issued share capital with details of their holdings.
- Details of the authorised and issued share capital.

The Annual Confirmation statement is made by the Nominated Person and has to be completed between 1 January and the end of February in each year following the year in which an entity is established. Each confirmation statement is to be accompanied by the relevant fee, currently £225.

The information contained in the annual confirmation statement is available for public inspection. Financial penalties are imposed for late filing of an Annual Confirmation Statement and failure to file is an offence and could result in the company being struck-off the Companies Register.

### Accounts

Jersey company law requires a company to maintain accounting records which are sufficient to explain its transactions and disclose with reasonable accuracy the financial position of the company. There is no need for a private company's accounts to be audited, unless this requirement is included in its articles of association. Annual accounts are required to be prepared within 10 months of the end of the company's financial year and should be made available to shareholders.

It is not necessary for the accounts to be filed with the Companies Registry, nor do they have to be filed with the Income Tax Department. However, the JFSC will generally require as part of the COBO Consent (as set out in *Regulatory Consents*) that, where auditors are not required to be appointed, the articles of association (or a specified transaction document) provide for an audit of the most recent accounts upon request (and at the expense of) 10% in value of the holders of the issued securities, although a derogation from this requirement can be obtained in certain circumstances.

### Annual general meeting

A private company is not required to hold an annual general meeting (AGM), unless it is deemed a relevant private company. Even if a company is a relevant private company, the requirement to hold an AGM can be waived by written agreement of all the shareholders.

A public company is required to hold an AGM each year and its first AGM must be held within 18 months of incorporation.

All members of a public or relevant private company can agree in writing to dispense with the requirement for an AGM. The AGM need not be held in Jersey. The notice period for calling an AGM is 14 days. If all the shareholders entitled to attend and vote at the AGM agree, an AGM may be held on shorter notice.

### **Register of shareholders and officers**

A private company must maintain registers of shareholders, directors and its secretary at its registered office. The registers must be available for inspection by the shareholders and the Companies Registry. Any change in location must be notified to the Companies Registry.

There is no requirement under the companies law in Jersey or otherwise to maintain a private register of charges or mortgages.

### **Special resolutions**

A company is required to file with the Companies Registry a copy of any special resolution passed by its shareholders. A special resolution is one passed by a majority of not less than two-thirds of shareholders entitled to vote, or such greater majority specified in the company's articles of association. A special resolution must be filed with the Companies Registry within 21 days of being passed and there are fixed financial penalties (of up to £100, currently) for late filing.

## **Regulatory consents**

Jersey has a modern and sophisticated securities issuance regulatory regime. There is a single regulatory authority, the JFSC, with an experienced team dealing specifically with securitisations and structured debt transactions.

### **Issue of securities**

To issue securities other than shares, a Jersey SPV will generally be required to obtain the consent of the JFSC under Article 4 of the Control of Borrowing (Jersey) Order 1958 (COBO Consent), except in very limited circumstances. The JFSC largely takes a 'hands-off' approach to regulation of securities issues and will undertake a review of the information document, together with a checklist setting out certain matters relating to the Jersey SPV issuer and the securities issue. The checklist is prepared in accordance with guidance on Securities Issues by Jersey Companies published by the JFSC. The terms of the COBO Consent may cover one or more securities issues and will generally contain certain conditions, such as minimum board composition requirements, a maximum aggregate principal amount to be issued and no change to key parties to the transaction or ownership of the Jersey SPV issuer.

### **Circulation of offer**

No prospectus filing requirements exist in Jersey provided the terms of the offer fall within certain exemptive 'safe harbours' which exclude certain categories of debt and equity invitations from being a prospectus for Jersey law purposes. The main benefit of this is that such invitations do not therefore require approval from the JFSC and do not give rise to any public prospectus 'filing' obligations.

The safe harbours include offers not being considered to be made to the public where they are made: to sophisticated investors, with a minimum denomination of EUR100,000 (or currency equivalent), with a minimum subscription of EUR100,000 (or currency equivalent) or to a restricted circle of persons (other than qualified investors and professional investors, as defined) (that is, 50 in Jersey and 150 outside of Jersey). The safe harbours apply in the alternative.

Where an offer does not fall within an exemption (which, in our experience, would be rare for structured finance transactions), thereby meaning a Jersey SPV issuer offering document will constitute a prospectus, a prospectus consent would be required from the JFSC.

## Economic substance

A Jersey SPV issuer that is resident for taxation purposes in Jersey will generally be a relevant entity for the purposes of Jersey economic substance rules, carrying on the activity of 'finance and leasing business'. The Jersey SPV issuer will therefore be required to meet the economic substance test on an annual basis.

The extent of activities carried out in Jersey will depend on the specifics of the transaction structure. Appropriate consideration by the board of the loans/assets to be purchased or originated and ongoing periodic review and monitoring (supported by information supplied to the Jersey SPV board by the arranger/sponsor or servicers of a structure) will typically enable a Jersey SPV issuer to meet the economic substance test.

CSPs, administrators and Jersey resident professional directors who are on the board of the SPV will play a significant role in ensuring the Jersey SPV's core income generating activities (known as CIGA) in Jersey are commensurate with economic output so that, where needed, the Jersey economic substance test can be met. Practically speaking, much of what is needed for a Jersey SPV to satisfy economic substance rules can be streamlined and covered by:

- The board meetings and other activities of the Jersey resident professional directors undertaken in Jersey.
- Full administration and company secretarial services provided to the Jersey SPV by its appointed CSP administrator.

Annual economic substance filings are undertaken as part of the non-material taxation returns prepared on behalf of the Jersey SPV by its CSP. They include a requirement to provide limited accounting information to support the economic substance profile of the Jersey SPV.

## Dissolution of the company

Once a structured finance transaction is concluded it is often the case that the company used as the orphan issuer is no longer required and can be dissolved. Under Jersey law, a Jersey company can be dissolved by any of the following:

- Voluntary winding-up.
- Creditors' winding-up.
- Dissolution following désastre.
- Just and equitable winding-up by court.
- Striking off (for failure to have an authorised registered office and/or file an annual confirmation statement).

## Voluntary winding-up

Winding-up a private Jersey company which is solvent (including one which has no assets and liabilities) is straightforward and is most often carried out by the directors without the involvement of a liquidator. A liquidator may be involved where the board is not able to conduct the winding-up, (for example, where the asset and liability position of the company is complex).

There is a requirement for a board meeting to be held, a shareholder special resolution to be passed and solvency statement(s) to be made by the directors. If the company has no assets and no liabilities at the point of giving the first solvency statement, only one solvency statement is needed. If the company has assets and/or liabilities at the point of giving the first solvency statement, then two solvency statements are needed. The procedure for winding-up differs slightly depending on which form of statement is given. For the purposes of this article, we assume two solvency statements will be required.

In order for the directors to make the solvency statement, it is necessary to ascertain the company's assets and liabilities, contingent or otherwise, and it is advisable to prepare financial statements and/or company accounts to the date of the commencement of the winding-up. A director who signs a statement of solvency which is then delivered to the Companies Registry without having reasonable grounds for making such statement, is guilty of an offence.

After the commencement of the winding-up (that is, the passing of the shareholder special resolution), the corporate state and capacity of the company will continue until it is dissolved. However, the powers of the company may continue to be exercised, but only so far as may be required for the realisation of assets, the discharge of liabilities and the distribution of assets in accordance with Jersey companies law.

On registration of the second statement of solvency with the Companies Registry, the company is dissolved.

### **Creditors' winding-up**

This enables a creditor of an insolvent company to apply to the court for that company to be placed into a creditors' winding-up and for a liquidator to be appointed.

A creditor may make an application to the court for an order to commence a creditors' winding-up if the creditor has a claim against the company for not less than the prescribed minimum liquidated sum and (i) the company is unable to pay its debts, (ii) the creditor has evidence of the company's insolvency or (iii) the creditor has the consent of the company.

The court may either (i) make an order that a creditors' winding-up must commence in respect of the company and appoint a liquidator or (ii) dismiss the application and make such order as it thinks fit.

On the commencement of a creditors' winding-up, the company must cease to carry on its business, except so far as may be required for its beneficial winding-up and the corporate state and capacity of the company continue until the company is dissolved.

Once the affairs of the company are fully wound up, the liquidator makes an account of the winding-up and calls a general meeting of the company and a meeting of the creditors for the purpose of explaining such account. The liquidator will then make a return to the Registrar. At the end of three months after the return is submitted to the Registrar the company is dissolved.

### **Dissolution following désastre**

A Jersey company unable to pay its debts as they fall due may be subject to a declaration of en désastre. A declaration en désastre may be sought from the court by any of:

- A creditor with a liquidated monetary claim in excess of a minimum figure (currently £3,000).
- The debtor company itself.
- The JFSC.

On a declaration en désastre, the Viscount takes title and possession of all property of the debtor and has wide powers to deal with the property, including powers to hold or sell. The Viscount can disclaim onerous property and can make applications to the court if there has been a transaction at an undervalue or a preference or, in the case of a company, wrongful trading or fraudulent trading.

The company is dissolved when the Companies Registry is notified by the Viscount of the payment of the final dividend.

### **Just and equitable winding-up by the court**

A company, not being a company in respect of which a declaration en désastre has been made (and not recalled), may be wound up by the court if the court is of the opinion that one of the following applies:

- It is just and equitable to do so.
- It is expedient in the public interest to do so.

### **Striking off**

If a Jersey company no longer has an authorised registered office (for example, if the corporate administrator no longer permits the use of their address by the company as its registered office), the Registrar may exercise its powers to strike the company's name off the register.

Further, and very often as a consequence of not having an authorised registered office, if the company is unable to file an annual confirmation statement, the Registrar may exercise its powers to strike off the company.

However, it is important to note that the powers of the Registrar to strike off the company due to its failure to have an authorised registered office and due to its failure to file an annual confirmation statement are two distinct non-compliances and each could separately trigger a potential strike-off event.

On the striking of the company's name off the register, the company shall by operation of law be dissolved; but the liability (if any) of every director and member of the company shall nevertheless continue and may be enforced as if the company had not been dissolved.

The court may, at any time within 10 years of the date of a company's dissolution, on an application made for the purpose, make an order declaring the dissolution to have been void and have the company reinstated as a company at the Companies Registry.

### **Conclusion**

Jersey continues to be a favoured jurisdiction for structured finance transactions given its cost efficiency and timely company incorporation processes, its depth of professional expertise and experience and regulatory framework appropriate to structured finance transactions.

**Further reading**

For an overview of the use of, and choice of jurisdiction for, special purpose vehicles in structured finance transactions, see *Practice note: overview, Structured finance SPVs and choice of jurisdiction*.

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